

CATCHWORDS

IMMIGRATION - Appeal from a decision of the Immigration Review Tribunal - Application for a December 1989 (temporary) entry permit on compassionate grounds - Reg.131A(1)(d)(v) of the Migration (1989) Regulations - meaning of "extreme hardship" and "irreparable prejudice" - whether compassionate grounds established

Migration Act 1958 ss.123, 138

Migration (1989) Regulations regs 131A, 142C

Cases considered

Minister for Immigration and Ethnic Affairs v Daphne Teo, unreported, Black CJ, Gummow, and Beazley JJ, Federal Court of Australia, 13 April 1995

Buck v Bavone (1976) 135 CLR 110

Kioa v West (1985) 159 CLR 550

Ali v Minister for Immigration, Local Government and Ethnic Affairs (1992) 38 FCR 144

Prasad v Minister for Immigration, Local Government and Ethnic Affairs (1993) 30 ALD 856

Mendoza v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 405

Min Jung v Minister for Immigration and Ethnic Affairs, Moore J, unreported, 16 November 1994

Sukhedi Horvath v Minister for Immigration and Ethnic Affairs (1995) 35 ALD 422

Broussard v Minister for Immigration and Ethnic Affairs (1989) 21 FCR 472

Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100

Amerasinghe v Minister for Immigration, Local Government and Ethnic Affairs (1991) 33 FCR 30

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

CHING LEONE LIM v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

No. NG 919 of 1994

BEAUMONT, EINFELD, R.D. NICHOLSON JJ.,

SYDNEY

8 AUGUST 1995

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. NG919 of 1994
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT
OF AUSTRALIA

BETWEEN: CHING LEONE LIM

Appellant

AND: MINISTER FOR IMMIGRATION
AND ETHNIC AFFAIRS

Respondent

CORAM: BEAUMONT, EINFELD, NICHOLSON JJ

DATE: 8 August 1995

PLACE: SYDNEY

MINUTES OF ORDER

THE COURT ORDERS:

Appeal dismissed, with costs.

Note: Settlement and entry of orders is dealt with in
Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

Regulation 142C of the Migration (1989) Regulations ("the Regulations") provided that for the grant of a "December 1989" (permanent) entry permit (a "permanent permit"), one of the criteria was that the applicant be the holder of a "December 1989" (temporary) entry permit (a "temporary permit"). Sub-regulation 131A(1) set out the criteria in relation to a December 1989 (temporary) entry permit, as follows:

"(d) on 15 October 1990 and continuously until the Minister decides to grant, or not to grant, the entry permit:

- (i) the applicant has a genuine and continuing relationship as the spouse of an Australian citizen or of an Australian permanent resident; or
- (ii) the applicant is a dependent child of an Australian citizen or of an Australian permanent resident; or
- (iii) the applicant is an aged parent of an Australian citizen or an Australian permanent resident and satisfies the balance of family test; or
- (iv) the applicant is:
 - (A) an aged dependent relative; or
 - (B) an orphan relative; or
 - (C) a special need relative; or
 - (D) a remaining relative within the meaning of regulation 9;
of a settled Australian citizen or settled Australian permanent resident; or
- (v) there is any other compassionate ground for the grant of an entry permit, to the effect that refusal to grant the entry permit would cause extreme hardship or irreparable prejudice to an Australian citizen or Australian permanent resident;
- (e).....
- (f).....
- (g) the applicant has been nominated by the relevant related person referred to in paragraph (d);

(emphasis added)

An application for a temporary permit and a permanent permit was lodged by Seung-Jin Ma ("Mr Ma") on 4 November 1991. On 24 November 1993, a delegate of the respondent Minister refused the application. An application for review of the delegate's decision by the Immigration Review Tribunal ("the Tribunal") was lodged by Ching Leone Lim

("Mr Lim") on 24 December 1993. On 12 April 1994 the Tribunal affirmed the decision. Mr Lim then appealed to this Court seeking an order quashing the decision of the Tribunal and an

order directing the Minister to issue a temporary permit to Mr Ma. A Judge of the Court (Lindgren J.), dismissed the application. The appellant now appeals from that judgment.

BACKGROUND

Lindgren J. found the following to be the background circumstances.

Mr Ma was born on 25 October 1955 and he is a Korean citizen. He entered Australia on 11 October 1986 on a student visa and was granted an entry permit which expired on 19 July 1987. Since that date he has been an illegal entrant. Mr Ma was accompanied to Australia by his wife and they have two children, both of whom were born in Australia. On 15 October 1990 the Minister announced a proposal to allow certain persons who were in Australia illegally before 19 December 1989 to regularise their status. For that purpose, the "December 1989" temporary and permanent entry permits were created. As already noted, the Regulations provided that an applicant for a permanent permit had to be a holder of a temporary permit. These Regulations, though now repealed, still apply to the review of this decision.

In his application for the December 1989 entry permit, Mr Ma identified Mr Lim as his "nominator" and the permanent resident who would be caused extreme hardship or

irreparable prejudice for the purpose of para. (d)(v) of Regulation 131A(1). Mr Lim provided a letter which accompanied the application in which the hardship was said to arise from the fact that Mr Ma had been the prime supplier to a retail clothing business he had acquired in May 1990. Mr Ma's business partner, Lee, Oh Bok ("Mrs Lee"), also provided a letter with the application in which she expressed the wish to be a nominator and asserted that she was totally dependent on Mr Ma in the running of a clothing shop which was opened in May 1991.

Mr Lim gave evidence before the Tribunal that in May 1990 he had been dependent on Mr Ma as a supplier, purchasing some 70% of his stock from him, and that this had been the position at the time Mr Ma made his application. However, Mr Lim stated that, since opening a new shop in 1992, his own buying power had increased so that at the time of the hearing he bought only 5-10% of his stock from Mr Ma and his business would not be seriously affected if Mr Ma could no longer supply him.

Mrs Lee gave evidence that she and Mr Ma owned half-shares in a retail business which was opened in May 1991, although discussions about it dated back to May 1990; she purchased 100% of her stock from Mr Ma; she was reliant upon Mr Ma's buying power to secure stock for her at very cheap

prices; she had invested about \$100,000 in the opening of the shop, but, as at 15 October 1990, she had not spent any money on this account; if Mr Ma had left Australia on 15 October 1990, she would not have proceeded to set up the shop; in June 1990 she bought her home for \$350,000, taking a \$250,000 mortgage on the property, and she was unable to pay the interest on the mortgage until after the shop was opened.

THE REASONING OF THE TRIBUNAL

The Tribunal found that since Mr Lim's evidence was that he was no longer reliant on Mr Ma as his supplier, the compassionate grounds with regard to the applicant "no longer pertain" so that claim failed. The Tribunal found, however, that by submitting her statement of support with Mr Ma's original application, Mrs Lee had "substantially complied with requirements to be considered a nominator of the Principal". Yet, the Tribunal also found that:

"...as Mrs Lee had, at 15 October 1990, not yet committed any money to the proposed plan to enter into a business relationship with the Principal [Mr. Ma], she would not have suffered extreme hardship had the Principal had to leave Australia at that date. The Tribunal also finds that the loss of the potential of opening a store with the Principal as her supplier does not represent an irreparable prejudice since the Tribunal is not satisfied, on the balance of probabilities, that there would not have been other equally profitable investment opportunities in which she could have invested her funds, notwithstanding her expressed preference to invest in a partnership with the Principal".

The Tribunal therefore affirmed the decision, refusing the grant of a temporary permit to Mr Ma.

THE REASONING OF THE PRIMARY JUDGE

Lindgren J. held that the language of para (d)(v) of Regulation 131A(1) clearly required that the "compassionate ground" must have existed on 15 October 1990 and that it must have existed continuously from that date until the Minister decided to grant, or not to grant, the temporary permit applied for. His Honour found that, as at 15 October 1990, Mrs Lee had not spent any money towards establishing the business and that the most that could be said was that, if Mr Ma had been required to leave Australia on that date, Mrs Lee would not have further pursued the proposal. Lindgren J. said:

"The evidence did not show.....that if Mr Ma had left Australia on 15 October 1990 the resultant loss of the opportunity to establish her business some seven months later would have constituted extreme hardship or irreparable prejudice... .

In particular, the evidence did not establish any link between the purchase of the house in June 1990 and the proposal to open the shop. For example, there was no evidence that the house would not have been purchased in June 1990 but for the existence and continued subsistence of the proposal to open the shop".

Before the trial Judge, the appellant submitted that the Tribunal did not comply with s. 123 of the Migration Act 1958 ("the Act") in that, the argument ran, it failed to make inquiries such as whether Mrs Lee had made commitments other than the payment of money at the relevant time or as to what alternative prospects of investment Mrs Lee had from 15 October 1990 through to the date of the Minister's decision.

Section 123 is as follows:

"123(1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

- (2) The Tribunal in reviewing a decision:*
- (a) is not bound by technicalities, legal forms or rules of evidence; and*
 - (b) shall act according to substantial justice and the merits of the case".*

His Honour found that any omission to make the inquiries suggested was not a failure to discharge the duty imposed on the Tribunal by s.123 of the Act.

The appellant further submitted that the Tribunal erred in considering whether extreme hardship or irreparable prejudice to Mr Lim existed at the time of the hearing instead of at the time of the decision by the Minister's delegate on 24 November 1993. His Honour found that it was unnecessary for him to determine the correct end date for the period referred to in the opening words of Regulation 131A(1)(d) because the appeal must fail for two other reasons: (1) the fact that before the Tribunal, Mr Lim agreed that his case to be treated as the "nominator" was "lost" and, (2) because Mr Lim's evidence was that he ceased to depend on Mr Ma as a supplier after October 1992.

The appellant now appeals to the Full Court on the following grounds:

- (a) The Tribunal was not entitled to conclude that the compassionate ground was not shown to exist on 15 October 1990, the "extreme hardship" or "irreparable prejudice" alleged being the continuous inability of Mrs Lee between May 1990 through to the opening of the shop after May 1991 to even pay the interest on the loan and the financial effects which that would have;
- (b) The Tribunal's omission to make inquiries was a failure to comply with s.123 of the Act;
- (c) It was wrong to hold that there was no evidence that the appellant's dependence on Mr Ma ceased a long time before the Minister's decision; the evidence was that Mr Lim ceased to be dependant "after October 1992" and there was no investigation as to when exactly this dependency ceased; and
- (d) It was sufficient to show that extreme hardship and irreparable prejudice existed at 24 November 1993, being the date of the Minister's decision, rather than at the time of the hearing before the Tribunal.

The appellant now seeks a declaration that Mrs Lee was subject to extreme hardship and irreparable prejudice as at 15 October 1990 and as at 24 November 1993, and consequential orders quashing the decision of the Tribunal and directing the respondent to issue a temporary entry permit.

CONCLUSIONS ON THE APPEAL

An error of law?

Section 138 of the Act provides for an appeal to the Federal Court on a question of law. A full discussion of the ambit of judicial review can be found in Minister for Immigration and Ethnic Affairs v Daphne Teo (unreported, Black CJ, Gummow, Beazley JJ, Federal Court 13 April 1995) pp 9-13. That case similarly involved an application for a temporary ("December 1989") entry permit on compassionate grounds.

In discussing the ambit of judicial review in such cases their Honours said that subsections (3) and (4) of s.34 of the Act impose an obligation on the Minister to grant an entry permit where it appears to the Minister that the applicant is entitled to it under the regulations. Their Honours emphasised that, in order to form the necessary opinion, the Minister must not only construe the regulations (a matter of law), but also make an assessment of fact. The Full Court was of the view that an assessment of fact in this

context, namely the existence of '*strong compassionate or humanitarian grounds*', fell squarely within the scope of what Gibbs J said in Buck v Bavone (1976) 135 CLR 110 (at 118-119) (as extracted by their Honours at p.6):

"It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these matters can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may very well be difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which can not be effectively reviewed by the courts."

The decision in Teo similarly embraced the words of Mason J in Kioa v West (1985) 159 CLR 550 (at 582):

"However, 'strong compassionate or humanitarian grounds' stand in a different position and may very much be a matter of opinion."

In order to obtain relief from this Court, the appellant must point to an error in law, not merely a difference of opinion. On any view this Court cannot conduct a merits review.

"Extreme hardship" and "irreparable prejudice"

It has been established that the compassionate grounds can be either "extreme hardship" or "irreparable prejudice". These are distinct terms and the adjective "extreme" has different connotations to the adjective "irreparable", just as the criteria of "hardship" and "prejudice" each carry their own essence: see Teo at pp 18-19.

Heerey J. elucidated the term "irreparable" in Ali v Minister for Immigration, Local Government and Ethnic Affairs (1992) 38 FCR 144 (at 148):

"I think 'irreparable' is used in Reg. 131A in the ordinary meaning of 'not reparable, incapable of being rectified, remedied or made good' (Macquarie Dictionary)."

The term "extreme hardship" was also discussed by Einfeld J in Mendoza v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 405 (at 412-413):

"As a matter of construction, 'extreme' may well bear a meaning similar to 'long term or permanent', at least in many cases. However, there is no reason on the face of the regulation why, as a matter of construction, the words 'any other compassionate ground' should be conceptually restricted in terms of availability or should do other than merely raise the question in each case of whether the hardship/prejudice criterion is established to the required degree."

The quality of misfortune that constitutes the

compassionate ground is considered in Teo (at 19-20) where it was emphasised that:

"Of course, each expression 'extreme hardship' and 'irreparable prejudice' is to be considered in the light of the requirement that what is caused by the refusal of the permit should constitute a 'compassionate ground'."

At p. 20 the Full Court drew from the judgment of Jenkinson J. in Prasad v Minister for Immigration, Local Government and Ethnic Affairs (1993) 30 ALD 856 (at 858):

"[T]he construction of the former expression [irreparable prejudice] is in my opinion to be considered in light of the requirement that what is to be caused by the refusal of the permit should constitute a 'compassionate ground'. Once its idiomatic, not to say hackneyed, transferred epithet has been unravelled, the clause with which sub-para. 131A (1)(d)(v) begins can be seen to amount to a requirement that the postulated hardship or prejudice be of such a degree as to excite compassion, in the sense of that word which is given second in The Oxford English Dictionary (second edition):

'the feeling or emotion when a person is moved by the suffering of distress of another, and by a desire to relieve it; pity that inclines one to spare or to succour.'

Accordingly I think that the expression 'irreparable prejudice' in section 131A (1)(d)(v) is to be construed as denoting a disadvantage to a person which is incapable of being rectified, remedied or made good and which excites compassion in the sense I have indicated."

It is thus clear that each term must be considered independently and that each term has its own threshold.

Consideration of the grounds of appeal

1.1 The trial Judge erred in holding the Tribunal was entitled to conclude that the compassionate ground described in reg 131A(1)(d)(v) was not made out in relation to Mrs Lee.

The appellant submitted that there was sufficient evidence for the Tribunal to conclude that either "extreme hardship" or "irreparable prejudice" would result if Mr Ma was prevented from remaining in Australia. However, the correct question for this Court is not whether there was an alternative conclusion on the facts, but whether the conclusion that the Tribunal reached was open to it on the facts.

In his reasons for judgment Lindgren J. included (pp 9-11) extracts from the transcripts of the proceedings before the Tribunal. In substance these passages canvass the evidence before the Tribunal in relation to the adverse consequences to Mrs Lee that would have followed Mr Ma's departure. They indicated that both the Tribunal and his Honour were fully cognisant of the evidence in relation to the matter and made their decisions on an informed basis.

At the commencement of the relevant period, Mrs Lee had not yet entered into the business venture with Mr Ma and

there was no evidence that any money had been expended in anticipation of her doing so. We agree with the trial Judge that the compassionate ground was not made out by the loss to Mrs Lee of a potential business venture. The Tribunal heard the applicant's evidence in this regard, considered it and dismissed it; the trial Judge reviewed the evidence and found no basis for altering the Tribunal's conclusions. Mere repetition of the appellant's claim to the Full Court without the identification of any manifest error of law does not provide a basis for altering that position.

The case of Mendoza concerned, inter alia, whether or not a potential loss amounts to a compassionate ground. The applicant submitted that if he was forced to leave the country, his employer among others would suffer "extreme hardship" or "irreparable prejudice". The applicant was the employer's production manager without whom, it was suggested, the business would certainly fail, leading to severe financial and emotional stress for the owner, the dismissal of other employees, and financial loss to shareholders. It was also alleged that the decision would have adverse consequences for Australia's economy. Additionally, there were concerns regarding the physical wellbeing of another staff member. The applicant asserted that the Tribunal had failed to consider the adverse consequences that would ensue if he was deported. However, the evidence indicated that those elements had been

considered, *'in many instances twice'* (at 420). It was therefore held not to be a case of failure to consider relevant factors because the Tribunal had considered them and concluded that they did not establish the compassionate ground.

Similarly in this case, the appellant asserted that the adverse consequences have not been considered, and that if they had been considered, the Tribunal would have had to uphold the claim. The fact is, however, that the evidence has clearly been considered yet neither the Tribunal nor the learned trial Judge concluded that the compassionate ground had been made out. What the appellant seeks to do in the Full Court is to overturn opinions that on the evidence were competent.

In anticipation of this outcome the appellant reformulated his submission to emphasise that the compassionate ground was the continuous inability of Mrs Lee to pay the interest on her housing mortgage. Attention was directed to the "extreme hardship" or "irreparable prejudice" that would be caused to Mrs Lee if Mr Ma was forced to leave the country, namely, further heavy indebtedness and the probable sale of the family home by the mortgagee exercising its power of sale. This submission solves for the moment one bar to the appellant's claims, viz. that the compassionate

ground must for the purposes of the regulations be operating from 15 October 1990. However, it does not provide the causative link between the adverse consequences and any decision to refuse the entry permit. Neither the Tribunal nor the trial Judge found evidence of a causal link between the purchase of the house and the opportunity to participate in the business. We have also found nothing to indicate that the inability to pay the mortgage would have been causally related to the departure of Mr Ma. Any inability to pay was not caused, in the sense that it was created by, Mr Ma's threatened departure, because it had begun before the first inkling of a joint venture.

To counter this seemingly obvious conclusion, the appellant submitted that the compassionate ground was in the worsening of Mrs Lee's financial position, rather than the creation of her dire straits. The "extreme hardship" or "irreparable prejudice" would be caused, in the sense that her financial position would worsen but for the intervention of Mr Ma. There is no doubt that if Mrs Lee's financial position did worsen and she did lose her home, this would be a seriously adverse event to her, but those hardships would not then have been caused by the denial of an entry permit to Mr Ma.

In Mendoza a similar scenario was presented. It was

dealt with in the following way (at 421):

"During that period, he has been of great assistance to the business. Although the applicant has naturally not been able to save the company from some adverse affects of the current recession, these effects may well and probably would have been worse if the applicant or a person with the applicant's abilities had not been there.

Far from failing to consider these matters and draw appropriate conclusions, it would have seemed to me to be stretching the facts more than a little if the delegate had concluded from them that, if Bambachs collapses in a heap and shuts up shop, it will be because the applicant is not available to them as production manager. Obviously if it occurs, 64 people will lose their jobs and with them, at least for a time, their incomes, personal or family security, human dignity and personal esteem. Without incomes for lengthy periods, some may lose their homes and other possessions. The resulting financial stress, if prolonged, may break up marriages and impoverish families. It would have been outrageous if the delegate had decided that such happenings, if they occurred, would not amount to extreme hardship for these persons, at least for a time. He did not do so. What he decided was that a 'refusal to grant the entry permit' being sought by the applicant would not bring about this hardship. This was not a failure to take these matters into consideration. It was a finding well open on the evidence. It was not tainted by illegality."

In the very same way the appellant asked us to find that if Mr Ma had left the country Mrs Lee would have lost her house. Significantly, it was submitted, it would have been because Mr Ma left the country that this happened. This is drawing a very long bow. There is no evidence to suggest that the clothing store was guaranteed to become a success. If Mrs

Lee had proved to be a poor manager or if the economic climate had turned, there may have been a very different outcome. As events happened, the profit from the clothing business was apparently sufficient to pay the mortgage. But that is some distance from saying that taking away the business opportunity which Mr Ma's presence would have permitted would have cost the Lees their family home.

The appellant thus asked us to be swayed by hindsight. Any new business is a risk and more than one business opportunity exists at any one time. It is simply not right to say that but for this business opportunity the Lees would have lost their home. The scenario presented by the appellant does not take into consideration that one of the joint venturers may have eventually declined to go ahead with the deal for their own reasons. At 15 October 1990 no contract was in place. Other business ventures may have come to light; Mrs Lee's business may have improved; the Lees may have chosen to move to a less expensive part of town; they may have taken in a lodger. Mr Ma may have appointed a manager to be his purchasing agent and directed operations of the business from overseas, thereby introducing the possibility that the business venture be continued despite Mr Ma's departure. There is simply no basis for inferring the causal connection required by the regulations.

The appellant submitted that it should not matter if the relevant hardship or prejudice changed during the applicable period, that is, the misfortune need not be of the same kind throughout the period. In essence the particulars of the compassionate ground might change, so long as some aspects of it exist continuously creating a context that establishes the compassionate ground. It is unnecessary to decide this point as we do not consider that in the relevant

sense the hardship alluded to would have been caused by a refusal to grant the entry permit.

Regulation 131A (1)(g) stipulates:

"(g) the applicant has been nominated by the relevant related person referred to in paragraph (d)... ."

The respondent submitted that Mrs Lee is not a nominator and therefore does not satisfy the regulations. There has been some debate as to whether or not the sub-regulation actually applies to the compassionate ground in 131A(1)(d)(v), but it is not necessary to determine the point in this case as it falls to be decided on other grounds.

1.2. The Tribunal erred in not considering both extreme hardship and irreparable prejudice.

The trial Judge extracted the relevant passage from the Tribunal, so it is not necessary to repeat it here. His Honour's own conclusion indicated that the possibility of both extreme hardship and irreparable prejudice were considered:

"On the evidence, as at 15 October 1990 Mrs Lee had not spent one cent towards establishing the business. The most that could be said on the evidence is that if Mr Ma had been required to leave Australia as at that date, Mrs Lee would then not have pursued any further proposal which at that stage she had in contemplation but to which she had not yet committed herself. It is not shown, and it

is not easy to see how it could be shown, that an abandonment on 15 October 1990 of an idea or proposal in those circumstances would have caused extreme hardship, or irreparable prejudice. The evidence did not show, and it is perhaps inherently unlikely that there would be any evidence to show, that if Mr Ma had left Australia on 15 October 1990 the resultant loss of the opportunity to establish her business some seven months later would have constituted extreme hardship or irreparable prejudice to Mrs Lee as at 15 October 1990."

The test was applied correctly. This ground of appeal must therefore fail.

1.3. The Tribunal erred in not considering the possibility that the compassionate ground be established by reference to others.

Whilst agreeing that case law was against him, the appellant submitted that the Tribunal should have considered the effect on the potential employees of Mrs Lee and Mr Ma's other franchisees. The appellant did not press this point but it deserves mention in passing. Firstly, in order to be considered, the hardship must be caused to a relevant related person who is the nominator: see Min Jung v Minister for Immigration and Ethnic Affairs, Moore J, unreported 16 November 1994. This would exclude those mentioned. Secondly, the appellant would nonetheless have to face the problem of the causal link. Whilst it might be that employees lose their jobs and devastating results follow, it could not be said these results were caused by the denial of an entry permit:

see Mendoza at 421.

2. The Tribunal's failure to inquire was a breach of s.123.

The possibility of alternate financial opportunities became the basis of the appellant's second ground of appeal. He submitted that the Tribunal's failure to make inquiries was a breach of s.123 of the Act. The substance of '*fair, just, economical and quick*' will depend on the circumstances.

As has been stated, the Tribunal held:

"The Tribunal also finds that the loss of the potential of opening a store with the Principal as her supplier does not represent an irreparable prejudice since the Tribunal is not satisfied, on the balance of probabilities, that there would not have been other equally profitable investment opportunities in which she could have invested her funds, notwithstanding her expressed preference to invest in a partnership with the Principal."

The Tribunal held that loss of a potential business opportunity would not be sufficient of itself to constitute the compassionate ground. Moreover, despite efforts to find something which, when considered with the loss of the potential business opportunity could constitute the compassionate ground, the Tribunal was unable to find it in the evidence. Nor was the Tribunal obliged under the circumstances to look further. Any evidence that may have shown it would be difficult for the appellant to find a

suitable investment would presumably have been considered and given due weight. But no such evidence was presented.

The appellant submitted that the Tribunal made a

positive finding that there were alternative investment opportunities available to Mrs Lee, but that there was no evidence for this finding and therefore the Tribunal was under a duty to inquire. We reject this proposition. There was evidence, though scant, that at some stage Mrs Lee had access to one hundred thousand dollars to invest in a business. It was not beyond reason for the Tribunal to infer from that evidence that alternate investment opportunities did in fact exist. No evidence beyond normal commercial experience is necessary to come to that conclusion. A similar submission was made in Mendoza where (at 426) the matter was dealt with in a manner that is equally appropriate here:

"In any event, as I have previously said in a different context, what the delegate did with his remark about impartiality was to draw attention to the absence of evidence from a single independent staff recruiter or employment agency on the likely availability of a suitable production manager. This is not irrelevant at all. Drawing inferences from the absence of evidence that might be expected to be available is done every day in all manner of human dealings, not limited to court cases, often as a means of testing other evidence or available inferences. There was no error in this approach."

In this case there was no evidence to contradict the natural inference that Mrs Lee had the opportunity and capacity to invest. Yet there can be no allegation that the Tribunal put undue weight on this lack of contravening evidence, nor that it took into account an irrelevant consideration. This is not a case of failure to inquire. It

is a case where the grounds required by the statute were not made out by evidence. In fact it is difficult to see what additional evidence may have been presented to establish the missing causal link.

The principle that a Tribunal is under no obligation to warn a claimant that what has been put forward is insufficient to persuade the Tribunal has been applied recently by Lockhart J. in Sukhedi Horvath v Minister for Immigration and Ethnic Affairs (1995) 35 ALD 422 (at 423). In expressing this principle his Honour drew upon the views of Gummow J. in Broussard v Minister for Immigration and Ethnic Affairs (1989) 21 FCR 472 (at 481), the decision of a Full Court of this Court in Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100 (see Keely J at 101, Jenkinson J at 108 and Gummow J at 119) and on Amerasinghe v Minister for Immigration, Local Government and Ethnic Affairs (1991) 33 FCR 30 per Olney J (at 38). Each of these authorities support the trial Judge's conclusion that the Tribunal did not breach section 123(1).

Nonetheless, in this instance the Tribunal did warn the applicant that the information provided was insufficient. Tribunal member Dr Witton said:

"I'm happy to put any further questions that you

might want me to investigate in this area, but my feeling is that there was no I'll have to think further on it, but the fact that it didn't, that it was a potential at that stage is quite different, than if money had been committed that would, I mean, as at 15 October 1990 there was Mr Ma disappears which means that her plans fall through, I mean she still has money to invest, you'd have to say that there is no, there would be no other source of investment opportunity for her or that there was I mean that would be a prejudice, an irreparable prejudice I suppose. I don't think it can be called a hardship at that stage because you're no further back than you were the day before."

(Emphasis added)

Mrs Lee did not deny that the money would still have been available, and there was no evidence of special conditions that attached to this money whether by way of loan or gift. It was therefore open to the Tribunal to find that an alternate investment may have been possible.

However, the overriding consideration here is that of causation. It was found by the Tribunal that the departure of Mr Ma would not cause the asserted misfortune. Thus whether an alternate investment existed, or not, was not germane and certainly does not provide grounds for upsetting the Tribunal's finding in relation to causation.

Additionally, the appellant submitted that the Tribunal failed to ask Mrs Lee what other commitments she might have made, other than financial, that might have amounted to extreme hardship or irreparable prejudice. The

answer to this is the same as for the previous complaint - the Tribunal is not under any duty to warn a claimant that the information presented is insufficient to support the claim.

The Tribunal did not breach s.123 by failing to inquire as to further investment opportunities. Consequently this ground of appeal also fails.

3. The Tribunal erred in deciding that Mr Lim did not meet the compassionate grounds

The appellant's submissions were twofold. Firstly, it was said that the Tribunal should not have been so quick to accept Mr Lim's representative's acquiescence that Mr Lim's case for a compassionate ground was lost. Secondly, the Tribunal got the relevant date wrong.

In our opinion the trial Judge adequately addressed these issues. The evidence of Mr Lim was that he ceased to be dependent on Mr Ma when his own buying power increased, that is *'because we have expanded our business, and we have that power now since October 92 since we opened a new shop'*.

The Minister's decision not to grant the permit was made on 24 November 1993. The date of the hearing before the Tribunal was 12 March 1994. As Lindgren J. pointed out, Mr Lim's evidence indicated that any dependency ceased 13 months prior to the earlier of the dates. Thus it was not necessary

to decide which the relevant date was, as on any view Mr Lim was not dependent at either time.

The appellant submitted that Mr Lim's words 'since October 1992' mean some time after October 1992. Additionally it was said to be of some significance that the Tribunal asked the questions of Mr Lim in respect of the wrong period of time. Dr Witton posed his questions in the present tense when, if it is accepted that the earlier date is the relevant date, he should have been referring to a date a few months earlier. In the appellant's submission, if it could be shown that the dependency existed up to the Minister's decision of 24 November 1993, this would constitute compassionate grounds.

The answer to these propositions is that there is nothing to indicate that dependency on a clothing supplier is sufficient to constitute the compassionate grounds contemplated by the legislature as enunciated in Prasad. Missing out on a potential commercial venture does not immediately excite compassion. Certainly, losing a potential business partner in a world of fierce competition would, of itself, be unlikely to constitute the compassionate ground.

A similar argument failed in Mendoza where the applicant's alleged indispensability as the production manager in a company was not found to constitute the compassionate

ground. The issue was considered at 423:

"Assuming against the policy guideline earlier referred to that the compassionate ground embraces the possibility of an entry permit being granted otherwise than on a family or close emotional basis, as the respondent conceded or did not seek to contradict in argument, it must be a very rare case where it would be so granted. I can see nothing to suggest that a finding that this is not such a case can be said to be unjustified in law or contrary to the legal obligations the delegate undertook when he applied himself to the matters raised by this application and its supporting material."

The second answer to the appellant's submission is that there is no basis for construing the words of Mr Lim other than as they were construed by the Tribunal and the trial Judge:

"Mr Lim's evidence was that he ceased to depend on Mr Ma as a supplier after he, Mr Lim, purchased a second shop in October 1992 and thereby acquired greater buying power. That was 13 months before the Minister's delegate decided on 24 November 1993 not to grant the entry permit."

Thus his dependency ceased when he opened his second store, because at that point, not at some later time, his purchasing power increased. Therefore at the relevant date, whichever that may be, Mr Lim was not dependant on Mr Ma and could not be caused a hardship or prejudice at that time.

The evidence from which Lindgren J. came to this

conclusion was Mr Lim's words regarding the second store. There is no scope to review his Honour's conclusion which we think was correct. But even if Mr Lim's words have been misconstrued, the error will be one of fact not of law. Teo (at 7-9) explains the position by reference to the comments by Mason CJ, in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 (at 355-6):

"But it is said '[t]here is not error of law simply in making a wrong finding of fact': Waterford v The Commonwealth (1987) 163 CLR 54 at 77 per Brennan J. Similarly, Menzies J observed in Reg v District Court; Ex parte White (1966) 116 CLR 644 at 654:

'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law.'

Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

This is not a case where there has been no probative evidence to lead to the conclusion. The words of Mr Lim carry much weight. The respective conclusions of the Tribunal and the learned trial Judge are not reviewable.

CONCLUSION

In summary, there is no persuasive basis for upsetting the trial Judge's findings in relation to when Mr Lim's dependency ceased. Even if there were, the circumstances would not pass the compassionate ground threshold. The appeal should be dismissed with costs.

I certify that this and the preceding twenty-seven (27) pages are a true copy of the Reasons for Judgment herein of the Court.

Associate

Dated: 8 August 1995

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